MST

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6918 OF 2006

Sau Akarsha A. Bandiwadekar — Petitioner
versus
Amit B. Bandiwadekar — Respondent

Ms.Vidya S. Gole for petitioner.
Ms.L.H.Belindage for respondent.

CORAM : A.S.OKA, J.
DATE : 29th June 2007

PC :

1. The submissions of the advocates appearing for the parties were heard yesterday. The dispute is between the petitioner-wife and the respondent-husband.

2. The petitioner filed a petition for decree of divorce against the respondent. In the said petition, an application was made under section 24 of the Hindu Marriage Act, 1955 for grant of interim maintenance. The said application was allowed by order dated 28th January 2000 by the learned Trial Judge by directing the respondent to pay the interim maintenance @ Rs.800/- per month to the petitioner from 10th June 1999. On

3rd July 2002 and on 15th November 2003 the petitioner applied for striking out the defence of the respondent on the ground of non payment of maintenance. On the application made at Exhibit-22 on 15th November 2003 as well as on the earlier application at Exhibit-18, the learned Trial Judge has passed the impugned order on 6th July 2006 rejecting the prayer made for striking out the defence.

3. The submission of the learned advocate for the petitioner is that admittedly the respondent is in arrears and has not complied with the earlier order. She submitted that the Trial Court has completely misread the decision of this Court cited before it. It is submitted that this was a fit case for striking out the defence.

4. The advocate for the respondent opposed the petition by pointing out that there is no wilful breach of the order passed by the Trial Court on the part of the respondent. She stated that the respondent was serving as a helper with a cable operator drawing a salary of Rs.1,500/- p.m.. It is not possible for him to pay the maintenance amount from such a meagre income. It is stated that the employment of the respondent is not

permanent. Therefore, it is impossible for the respondent to pay the monthly alimony. It is stated that the respondent is maintaining his old parents and there is no monitory help coming from his parents. It is, therefore, stated that the Trial Court was justified in passing the impugned order.

5. I have considered the submissions. It must be noted here that there is no dispute that the respondent has not complied with the order dated 28th January 2000 passed by the Trial Court below application at Exhibit-5. A perusal of the impugned order of the Trial Court shows that a reliance was placed by the petitioner on the decision of this Court in the case of Vanmala Maroti Hatkar Vs. Maroti Sambhaji Hatkar (1999[2]-Mh.L.J.-297). The view taken by this Court in the said decision is that where an order under section 24 of the said Act of 1955 is not complied with in a petition filed by the husband, the Matrimonial Court has a power to stay the hearing of the petition for divorce filed by the husband till the maintenance amount is paid. Similarly this Court took a view that where the husband is the respondent in a matrimonial petition filed by the wife, the Court can strike

out the defence, if it is found that the respondent has deliberately flouted the orders of the Court regarding payment of maintenance. In paragraph no.6 of the impugned order, the learned Judge has dealt with the said judgment by making the following observations:-

> "6. After going through the observations of the Hon'ble Mumbai High Court, it is crystal clear that it is a guideline for the matrimonial Court (Family Court) where there is a difficulty to execute the order of interim maintenance. In the matrimonial Court, if the order of interim maintenance is passed and if either party is not complied with the said order then, the party in whose favour the order is passed is entitled to move the application u/s.151 of C.P.C. to get the execution of the order of interim maintenance by seeking the directions against the party to strike his defense. The Court can stay the proceeding, if the petitioner has committed the breach.
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> 7. The present matter is filed in the Court of Civil Judge, S.D. and there is provisions to execute the order of interim maintenance by filing the execution proceeding. Even she could attach the property of Respondent husband for recovery of the arrears of interim maintenance. Therefore, the observations of the Hon'ble High Court on the basis of which the petitioner has prayed for striking of defense of the respondent is not applicable to the case in hand considering the different set of facts and the Court having the power to execute it's order in the execution proceeding."

6. To say the least, the approach adopted by the

learned Judge is shocking. This Court has laid down law regarding the power of the Court dealing with the petition under the said Act of 1955 to pass appropriate orders where the husband has not complied with the order under section 24 of the said Act of 1955. In the case before this Court, the petition was pending before the Family Court. The learned Trial Judge has surprisingly gone to the extent of recording a finding that the observations made by this Court are not applicable as the same will govern the Matrimonial Court (Family Court) where there is a difficulty in executing the order of interim maintenance. The learned Judge has observed that in the Family Court it is difficult to execute the order of interim maintenance, however, in case of a Civil Court, there are provisions to execute the order of granting interim maintenance by filing execution application. This is not the way in which a binding ratio of a decision of this Court is to be considered by a Court subordinate to this Court. The learned Judge has completely ignored the provisions of Section 10 of the Family Courts Act which confers all the powers under the Code of Civil Procedure, 1908 on a Family Court.

7. In this case, the first application made by the petitioner for striking out the defence was in the year 2002. The present application was made in the year 2003. The order impugned has been passed in July 2006. The application remained pending for considerably long time. All along the order passed below Exhibit-5 was operating and even till today it is subsisting. The fact that no efforts were made by the respondent for all these years to comply with the order is sufficient to draw a conclusion that there is a deliberate and/or wilful defiance of the order passed by the Trial Court. In view of this defiance, the Trial Court would have been justified in striking out the defence of the respondent. However, that was not done by the Trial Court by completely misinterpreting a binding judgment of this Court. The error committed by the Trial Court will have to be set right in this petition under Article 227 of the Constitution of India. However, while interfering with the impugned order, a last opportunity is required to be granted to the respondent-husband to comply with the order. Though I am inclined to strike out the defence, I propose to grant a reasonable time to the respondent to comply with the order below

Exhibit-5.

8. Hence, I pass following order :-

a) The impugned order dated 6th July 2006 is quashed and set aside;

b) If respondent fails to comply with the order passed by the Trial Court below Application at Exhibit-5 dated 28th November 2000 by paying the arrears up to date on or before 16th August 2007, the Trial Court will strike out the defence of the respondent and in such case, the applications at Exhibits 18 and 22 will stand allowed;

c) If the respondent deposits the entire amount due and payable as per the order below Exhibit-5 on or before 16th August 2007, the applications at Exhibits 18 and 22 will stand dismissed and the respondent will be entitled to contest the petition filed by the petitioner;

d) In view of this order, till 16th August 2007, the Trial Court shall not proceed with the final hearing of the petition;

e) It is made clear that all the contentions of the parties on merits of the petition are expressly kept open;

f) The Trial Court will decide the pending petition as expeditiously as possible.

(A.S.OKA, J.)